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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 2

RED LION BROADCASTING CO., INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinions of the District of Columbia Circuit in No. 2 (A., No. 2, 91–132) are reported at 381 F. 2d

908. The opinion of the Seventh Circuit in No. 717 (A., No. 717, 344a–373a) is not yet reported.

JURISDICTION

The judgment of the court of appeals in No. 2 was entered on June 13, 1967. The petition for a writ of certiorari was filed on September 11, 1967, and was granted December 4, 1967 (389 U.S. 968).

The judgment of the court of appeals in No. 717 was entered on September 10, 1968. The petition for a writ of certiorari was filed on November 7, 1968, and was granted on January 13, 1969.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).[1]

QUESTIONS PRESENTED

The Federal Communications Commission has adopted rules codifying its policy requiring broadcast licensees to afford an opportunity for reply to any person subjected to a personal attack in connection with the discussion of a controversial issue of public importance and to any political candidate against whom the licensee has editorialized.

---

[1] On January 29, 1968, after certiorari had been granted in No. 2, the Court denied certiorari before judgment in the case that is now No. 717, *Radio Television News Directors Assn., et al.* v. *United States, et al.*, No. 993, 1967 Term (390 U.S. 922). However, on the same date the Court entered an order in No. 2 (then No. 600, 1967 Term) postponing oral argument in that case pending decision of the Seventh Circuit in *Radio Television News Directors Assn.* and this Court's action on any petition for certiorari which might be filed seeking review of that decision (390 U.S. 916).

The question presented by No. 2 is whether the personal attack policy, as applied in an *ad hoc* ruling on a specific situation prior to adoption of the rules, is consistent with the First Amendment.

The question presented by No. 717 is whether the rules and the policies related thereto are consistent with the First Amendment.

STATUTES AND REGULATIONS INVOLVED

1. The relevant provisions of the Communications Act of 1934, 48 Stat. 1064, as amended (47 U.S.C. 151 *et seq.*), are as follows:

SEC. 4 (47 U.S.C. 154):

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings.

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

* * * * *

SEC. 303 (47 U.S.C. 303):

Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

* * * * *

SEC. 315 (47 U.S.C. 315):

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bone fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be con-

strued as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

SEC. 503 (47 U.S.C. 503):

* * * * *

(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

(C) fails to observe any final cease and desist order issued by the Commission,

(D) violates section 317(c) or section 509(a)(4) of this Act, or

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

shall forfeit to the United States a sum not to

exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

(2) No forfeiture liability under paragraph (1) of this subsection (b) shall attach unless a written notice of apparent liability shall have been issued by the Commission and such notice has been received by the licensee or permittee or the Commission shall have sent such notice by registered or certified mail to the last known address of the licensee or permittee. A licensee or permittee so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulations prescribe, why he should not be held liable. A notice issued under this paragraph shall not be valid unless it sets forth the date, facts, and nature of the act or omission with which the licensee or permittee is charged and specifically identifies the particular provision or provisions of the law, rule, or regulation or the license, permit, or cease and desist order involved.

(3) No forfeiture liability under paragraph (1) of this subsection (b) shall attach for any violation occurring more than one year prior to the date of issuance of the notice of apparent liability and in no event shall the forfeiture imposed for the acts or omissions set forth in any notice of apparent liability exceed $10,000.

2. The regulations under review in No. 717 appear in identical texts as §§ 73.123, 73.300, 73.598 and 73.679 of the Commission's rules and regulations (governing, in each case, a different class of broadcast station). The text is as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee.)

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed.

Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

STATEMENT

These cases involve the constitutional validity of aspects of the Federal Communications Commission's Fairness Doctrine, *viz.*, the policies and rules relating to personal attacks and political editorializing. The Fairness Doctrine is based upon the public's right to be informed on public issues. It is designed to insure that conflicting views on controversial issues of public importance have access to the broadcasting medium. The personal attack policy, as one aspect of this basic principle, requires that a station which carries an attack upon a person or group during the presentation

of views on a controversial public issue implement the public's right to hear the other side by advising the person or group attacked of the attack and offering a reasonable opportunity to respond.

That policy was the basis for the Commission ruling under review in No. 2 and, with limited refinements, is embodied in subsequent regulations under review in No. 717. Similarly, the political editorializing requirement, also included in the regulations, requires the offer of a reasonable opportunity to respond to licensee editorials supporting or opposing a particular candidate during political campaigns.

No. 2 (hereinafter *Red Lion*) involves a challenge to a 1965 Commission order directing Red Lion Broadcasting Co., Inc., licensee of radio station WGCB in Red Lion, Pennsylvania, to afford time to Fred J. Cook to respond to an attack against him in a broadcast by Reverend Billy James Hargis. No. 717 (hereinafter *RTNDA*) involves a general challenge to the constitutionality of the personal attack and editorializing rules adopted by the Commission in 1967 and amended in 1967 and 1968.

1. THE LEGISLATIVE AND ADMINISTRATIVE BACKGROUND

Since the rules and related policies in issue are particularized aspects of the Fairness Doctrine, initial consideration of the development of that principle as an expression of the obligation of broadcasters to operate under their licenses in the public interest will assist in placing the issues in these cases in perspective.

A. *Early History.* The first statute dealing specifically with broadcasting was the Radio Act of 1927

(44 Stat. 1162).[2] The direct predecessor of the Communications Act of 1934, it created the Federal Radio Commission and authorized that agency to license and regulate all uses of radio.

In reporting out H.R. 9971, the bill enacted as the Radio Act of 1927, the Senate Committee on Interstate Commerce added a provision to the House bill which would have made broadcast stations common carriers as to "any question affecting the public" for the discussion of which the licensee permitted the station to be used (S. Rep. No. 772, 69th Cong., 1st Sess., p. 4 (1926)). However, the requirement was not considered workable, since a station would have had to give time to anyone who presented himself, and Senator Dill, the Committee chairman, offered an amendment on the floor of the Senate to limit the provision to candidates for public office (67 Cong. Rec. 12501–12505).[3] As somewhat revised, this amendment became Section 18 of the Radio Act of 1927 (44 Stat. 1170), which provided:

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[2] The Radio Act of 1912 (37 Stat. 302), the first statute to require a license for the use of radio, did not refer to broadcasting.

[3] Senator Howell objected to the change because, "to perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue" (67 Cong. Rec. 12503).

Senator Dill responded, "I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words 'public questions' in the bill.

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but

If any licensee shall permit any person who is a legally qualified candidate for any public office

that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

"As I say, I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time, but to await developments, and get this organization to functioning, and the bill can be amended in the future.

"I just wanted to leave that idea with the Senator as to my reasons for taking the view I do" (67 Cong. Rec. 12504).

Senator Dill subsequently made clear that his amendment was not intended to prevent the Commission from making rules to require that both sides of a controversy be heard. The following colloquy occurred at hearings held in 1930:

Commissioner Robinson. Let us go farther and say that one of the stations in Washington, WMAL, would to-night put on a forceful speech against labor, making a strong argument against labor, labor organizations. Ought not labor to have the opportunity to reply with equal facility? If denied, how about equal opportunity for freedom of speech? It is, after all, merely an enlargement of this natural transmitter. I am using a frequency from my transmitter to your receiving set now.

Senator Dill. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

Commissioner Robinson. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, "I am entitled to this opportunity," and he will get it.

Senator Dill. Has the commission considered the question of making regulations requiring stations to do that?

Commissioner Robinson. Oh, no.

Senator Dill. It would be within the power of the commission, I think, to make regulations on that subject. [Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., p. 1616 (1930).]

> to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Soon after its establishment, the Federal Radio Commission adopted as its own policy under the new statute the principle that

> * * * it would not be fair, indeed it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public. [*Great Lakes Broadcasting Co.*, 3 F.R.C. Annual Rep. 32, 33 (1929), reversed on other grounds, 37 F. 2d 993 (C.A.D.C.), certiorari dismissed, 281 U.S. 706.]

See also *Chicago Federation of Labor,* 3 F.R.C. Annual Rep. 36 (1929), affirmed *sub nom. Chicago Federation of Labor* v. *Federal Radio Commission,* 41 F. 2d 422 (C.A.D.C.).

Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934 without

change (48 Stat. 1088).[4] The newly created Federal Communications Commission continued its predecessor agency's policy on fairness in broadcasting. In *Young People's Association for the Propagation of the Gospel,* 6 F.C.C. 178 (1938), the Commission denied an application for a construction permit primarily because of the applicant's policy of refusing to permit the use of its broadcast facilities by persons or organizations wishing to present any viewpoint different from that of the applicant. Again in 1940, the Commission stated: "In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions" (6 F.C.C. Annual Rep. 55 (1940)). During the succeeding years, the Commission continued to apply the fairness principle on an *ad hoc* basis in individual cases (see, *e.g., United Broadcasting Co.,* 10 F.C.C. 515 (1945); *Robert Harold Scott,* 3 Pike & Fischer R.R. 259 (1946); *WBNX Broadcasting Co.,* 12 F.C.C. 805 (1948); *Laurence W. Harry,* 13 F.C.C. 23 (1948).

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[4] Earlier proposed legislation, H.R. 7716, 72d Cong., 2d Sess. (1932), would have required "equal opportunities" not only for candidates for public office, but also for persons using a station "in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election" (S. Rep. No. 1045, 72d Cong., 2d Sess., pp. 8, 11 (1933); 76 Cong. Rec. 3768). The bill also provided that "it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions" (H. Rep. No. 2106, 72d Cong., 2d Sess., p. 4 (1933)). This bill was pocket vetoed, however, and accordingly never became law.

B. *The Report on Editorializing.* In 1940, the Commission had declared in *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339, that "the broadcaster cannot be an advocate," and that opinion was generally construed as a prohibition of broadcast editorializing. In 1947, the Commission deemed it desirable to reexamine the questions of editorializing and, in general, the "obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion * * *" (13 F.C.C. at 1246), and accordingly held extensive public hearings, which culminated in the *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949) (hereinafter *Report on Editorializing*). This report includes the fullest single exposition of the Fairness Doctrine.

In the *Report on Editorializing,* the Commission determined that licensees should be free to editorialize, and at the same time reemphasized that a basic element of operation in the public interest "is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole" (13 F.C.C. at 1248). Consequently, in the "presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise" (13 F.C.C. at 1250).

Basic to the Commission's position there stated was its view that broadcasters operate their facilities as a public trust under the public interest standard

of the Communications Act (see 47 U.S.C. 307(a), 309), and that the public interest could not be served by a licensee who made radio unavailable as a medium of free speech (13 F.C.C. at 1247–1248). In elucidating this notion so central to the instant controversy, the Commission stated (13 F.C.C. at 1249):

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed,

rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

In rejecting any assertions that action to further this right would contravene the First Amendment, the Commission stated (13 F.C.C. at 1256–1257):

> * * * We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgement by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment.
>
> * * * * *
>
> We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the first amendment. *United States* v. *Paramount Pictures, Inc., et al.*, 334 U.S. 131, 166. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full

> effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. * * *

Thus, the Commission stated as its policy that licensees have a general obligation (1) to devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance, and (2) in doing so, to be fair—that is, affirmatively to endeavor to make their facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented (13 F.C.C. at 1249–1252). While affirming the licensee's general discretion in determining the issues to be covered, the shades of opinion to be presented, the appropriate spokesmen, and the amount of time to be afforded (13 F.C.C. at 1251), the Commission clearly indicated that the "personal attack" situation might give rise to a more specific obligation (13 F.C.C. at 1252).

C. The 1959 Amendment to Section 315(a) of the Communications Act. In 1959, some ten years later, Congress amended Section 315(a) of the Federal Communications Act (47 U.S.C. 315(a)) to exempt from the "equal time" requirement for political candidates the appearance by a legally qualified candidate on any bona fide newscast, bona fide news interview, bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or on-

the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto) (73 Stat. 557)[5]. However, it further provided in the amending language that:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The Senate bill, as reported out of committee, had not contained the sentence quoted above.[6] The views of the Senate Interstate and Foreign Commerce Committee were, however, set forth in the report accompanying the bill as follows (S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8–9 (1959)):

> The equal time provision of section 315(a) was designed to assure a legally qualified candidate that he will not be able to acquire unfair advantage over an opponent through favoritism of a station in selling or donating time or in scheduling political broadcast. If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the

[5] This amendment was made in response to the Commission's ruling in *CBS, Inc. (Lar Daly)*, 26 F.C.C. 715, 18 Pike & Fischer R.R. 701 (1959) that a political candidate's appearance on a newscast gave other candidates an "equal opportunity" to use the station's facilities.

[6] S. 2424, 86th Cong., 1st Sess. (1959).

> present provision regarding equal time and urge the right of each broadcaster to follow his own conscience in the presentation of candidates on the air. However, *broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.* Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias. [Emphasis added.]

The Committee report, to prevent any misunderstanding as to the possible effect of the proposed legislation on the Fairness Doctrine, went on to state (*id.* at 13);

> In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy.

Senator Pastore, Chairman of the Senate Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, and a manager of the bill, reiterated the views of the Committee in introducing the bill on the floor of the Senate:

> * * * Under existing law and policy it is absolutely mandatory that they [broadcasters] shall serve the public interest because these media are in the public domain, and therefore they should be fair in their treatment in all events. [105 Cong. Rec. 14440.]

Senator Proxmire offered an amendment to assure that all viewpoints in public controversies would be presented, and the following colloquy ensued:[7]

> Mr. PASTORE. What the Senator from Wisconsin is doing, as I understand, is appending to the amendment a statement of the philosophy that these media are in the public domain, and that where it is practically possible all sides shall be given a fair opportunity of exposure to the public.
>
> Mr. PROXMIRE. The Senator is correct.
>
> Mr. PASTORE. But it in no way infringes upon the exceptions which we have spelled out?
>
> Mr. PROXMIRE. The Senator is correct
>
> * * * * *
>
> Mr. DOUGLAS. I congratulate the Senator from Wisconsin for his amendment. As I see it, the wording of the amendment puts into the act the declaration which the committee itself made on page 13 of its report, but it reinforces that declaration by making it a part of the statute, and hence binding, whereas the report is merely of a persuasive nature but is not controlling.
>
> Mr. PROXMIRE. The Senator is exactly correct. The purpose is the same as expressed

[7] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given an equal opportunity to be heard as is practically possible." (105 Cong. Rec. 14457.)

> on page 13 of the committee report and is for the purpose which the Senator from Illinois has expressed it. [105 Cong. Rec. 14457.]

Senator Pastore accepted the amendment with the following comment:

> Mr. PASTORE. Mr. President, I understand the amendment to be a statement or codification of the standards of fairness. I understand that the Commission is now obliged by existing law and policy to abide by the standards of fairness.
>
> I repeat that I consider the amendment to be rather surplusage; but I shall accept the amendment and shall take it to conference, if it means to emphasize the objective which all of us desire to accomplish. [105 Cong. Rec. 14462.]

In the House of Representatives another bill on the the same subject was passed,[8] and because of differences between the House and Senate versions, a Conference Committee was appointed.[9] In the conference, the Proxmire amendment was modified to read as the last sentence of Section 315(a) now appears (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1959)). This modification was accepted by both the House[10] and the Senate.[11]

In the Senate discussion of the Conference Committee report, Senator Pastore emphasized the importance of the Proxmire amendment by stating (105 Cong. Rec. 17830):

> We insisted that the provision remain in the bill, to be a continuing reminder and admoni-

[8] H.R. 7985, 86th Cong., 1st Sess. (1959).
[9] 105 Cong. Rec. 16260, 16375, 16588.
[10] 105 Cong. Rec. 17778, 17782.
[11] 105 Cong. Rec. 17832.

> tion to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country.

Senator Scott, one of the managers on the part of the Senate, elaborated on these remarks as follows (105 Cong. Rec. 17831):

> * * * We have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out what I do not think has yet been explained, that the phrase "To afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. *It is intended to encompass all legitimate areas of public importance which are controversial,* and there are many, as we know, which pertain to medicine, to education, and to other areas than political discussion, and *it is intended that no one point of view shall gain control over the airwaves to the exclusion of another legitimate point of view.* [Emphasis added.]

In sum, as the Conference report made clear, the Proxmire amendment was a congressional "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1959)).

D. *The Fairness Primer.* After the Fairness Doctrine had thus been expressly sanctioned and approved by Congress, the Commission continued to enforce and give content to the principle in individual cases. As the cases developed, the Commission considered further the personal attack problem which it had first called to the attention of broadcasters in the *Report on Editorializing* (see *supra,* p. 17). A Public Notice mailed to all licensees on July 25, 1963 (25 Pike & Fischer R.R. 1899), reminded broadcasters of their duty to comply with the Fairness Doctrine generally, and called particular attention to past cases specifying requirements for compliance when personal attacks had been broadcast (*id.* at 1900):

> (a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (*Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586, 591; *Billings Broadcasting Company,* 23 Pike & Fischer, R.R. 951, 953).

The Public Notice also indicated that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, might be appropriate to delineate more explicitly a licensee's responsibilities regarding fairness. See also *Letter to Douglas A. Anello,* 25 Pike & Fischer R.R. 1900b, 1900d (1963). The resulting study culminated in a Public Notice known as the Fairness Primer (29 Fed. Reg.

10415 (1964)),[12] which collected all previous Fairness Doctrine rulings having substantive content. Although the Commission had earlier defined and elaborated on its procedures for handling fairness complaints (*Letter to Oren Harris,* 3 Pike & Fischer R.R. 2d 163 (1963)), the Commission expected that by compiling and categorizing its rulings and making them a matter of public record, it might reduce the number of complaints of alleged unfairness and of violations as well (29 Fed. Reg. at 10416).

The Fairness Primer contained a section specifically devoted to the personal attack aspect of the Doctrine. It made clear, *inter alia,* the following salient points (29 Fed. Reg. at 10420–10421):

(1) When an attack is made on an individual's or group's integrity, character, honesty, or like personal qualities, in connection with a controversial issue of public importance, the licensee has an affirmative duty to take all appropriate steps to see to it that the person or persons attacked are afforded the fullest opportunity to respond. The licensee cannot avoid responsibility because of his lack of involvement in the personal attack since, with the exception of the equal opportunities provision of Section 315, a licensee is fully responsible for all matter which is broadcast over his station.

(2) Where a personal attack is broadcast, a licensee has an obligation to send a transcript or tape of the

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[12] The full title of the Fairness Primer, which focused directly on its purpose and content, was "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" (29 Fed. Reg. 10415).

program to the person attacked. Where no script or tape is available, the licensee must send as accurate a summary as possible.

Accordingly, the basic operating precepts of the personal attack aspect of the Fairness Doctrine had been established through an evolutionary process involving *ad hoc* decisions in specific cases, and these principles had been publicly promulgated, when the *Red Lion* case arose.[13]

2. THE RED LION PROCEEDING

On November 27, 1964, Station WGCB in Red Lion, Pennsylvania (hereinafter "Red Lion") carried a broadcast by Reverend Billy James Hargis on the

[13] Congress was informed on several occasions of the Commission's policies in the personal attack area. See Hearings before the Senate Subcommittee on Communications of the Committee on Commerce on S. 251, S. 252, S. 1696 and H.J. Res. 247, 88th Cong., 1st Sess., pp. 97–98 (1963) (hereinafter 1963 Senate Hearings on S. 251); Hearings before the House Subcommittee on Communications and Power of the Interstate and Foreign Commerce Committee on Broadcast Editorializing Practices, 88th Cong., 1st Sess., pp. 88–89, 140–141, 156–166 (1963) (hereinafter 1963 House Hearings on Broadcast Editorializing). In testimony before the Senate Subcommittee, then Commission Chairman Henry indicated that in the personal attack area the Commission might "want to come up with a primer as we have done under 315, and set out a series of examples of past cases we have handled in the field of editorializing. We may want to issue a new policy statement or adopt some rules or some combination of all of those" (1963 Senate Hearings on S. 251, p. 67; see also 1963 House Hearings on Broadcast Editorializing, p. 89). Senator Pastore, Chairman of the Subcommittee, stated that he thought "the rule idea is a good idea," and hoped that, "the Commission would get into this immediately" (1963 Senate Hearings on S. 251, p. 68).

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"Christian Crusade" program. The program included a discussion of the 1964 presidential election and a book about the Republican campaign, "Goldwater—Extremist On The Right," written by Mr. Fred J. Cook (A., No. 2, 9, 61–62): During the course of the program, Hargis made the following statements about Cook (A., No. 2, 61–62):

> Now, this paperback book by Fred J. Cook is entitled, "GOLDWATER—EXTREMIST ON THE RIGHT." Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U.S. or by other government agencies * * *. Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing * * * there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency * * * now this is the man who wrote the book to smear and destroy Barry

Goldwater called "Barry Goldwater—Extremist Of The Right".

Upon learning of this syndicated broadcast, Cook wrote a letter to Red Lion asking whether WGCB had broadcast the above remarks by Hargis and, if so, requesting time to reply at the station's expense (A., No. 2, 33–34). Red Lion responded by merely supplying Cook with copies of letters it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union and a copy of its rate card, with the suggestion that Cook notify the station concerning the time he might wish to purchase (A., No. 2, 34–35). By letter dated December 31, 1964, Cook repeated his inquiry whether the station had in fact carried the broadcast by Hargis (A., No. 2, 35–36). To this last letter Red Lion answered (A., No. 2, 36–37):

> Regarding your letter of December 31, 1964, we [are] at a loss to understand your statement that may imply that we ought *not* to "drum-up business"—we could ask, "How else may we be expected to stay in business?"
>
> Your suggestion that we grant you "free time" for a brief reply, prompts me to ask what would happen if General Motors advertised the "best car" and Ford then demanded "free time" to inform our listeners that they had been slandered. This would soon remove all broadcasting from the realm of free enterprise, leaving only government subsidized and controlled radio. I am sure Mr. Cook, that you would not wish this to happen.

> For your information, it was your article on "The Hate Club of the Air" which alerted us to several of these broadcasts which we later acquired, so that now we carry them all. Your article has resulted in cutting our deficit spending by almost one half, thus the harm that was intended has greatly benefited us.
>
> As to the tape in question, we have run the tapes that we have received from Dr. Hargis. We doubt that he has discriminated against our Station in this instance.

On February 7, 1965, Cook filed a complaint with the Commission (A., No. 2, 26–29), alleging that Red Lion had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. In addition, he alleged that the station was insisting upon payment for any reply broadcast.[14]

The Commission brought the complaint to the attention of Red Lion and requested an answer within twenty days (A., No. 2, 31). By letter dated May 19, 1965, Red Lion admitted carrying the broadcast by Hargis on WGCB (A., No. 2, 32–33). It urged, however, that free time should be necessary only if paid

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[14] Cook's letter listed 15 other stations that had acknowledged carrying the same broadcast but similarly refused free reply time. It went on to report that, "Of all of the stations carrying the Rev. Billy James Hargis' attack against me, just one, KXEN, in St. Louis, notified me of his remarks and sent me a transcript of them as the rule requires. I have since learned through correspondence with one of the stations that the Rev. Carl McIntire made a similar attack upon me last fall over his network of several hundred stations, none of whom notified me of this. As a result, I still do not know what he said, and it is now too late to counter it" (A., No. 2, 26–27).

sponsorship was unavailable, and that its inquiries to Cook were directed toward ascertaining whether he was prepared to obtain a sponsor or was willing to pay for the reply broadcast, concluding (A., No. 2, 33):

> The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to "sponsor" or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

By letter dated October 6, 1965, the Commission rejected Red Lion's contentions (A., No. 2, 37–40). It stated its policy that when a personal attack was broadcast a licensee was obligated to inform the person involved of the attack, to send him a tape or transcript of the broadcast, and to offer him a comparable opportunity to respond. The Commission found that the broadcast had involved a personal attack on Cook and that Red Lion had violated the Fairness Doctrine by not complying with these requirements. With respect to payment for reply time, the Commission stated (A., No. 2, 39):

> The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was

not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and "elemental fairness" not achieved as to the person attacked (*Editorializing Report,* Paragraph 10)—simply because sponsorship is not forthcoming. Cf. *Cullman Broadcasting Co., supra.*

On November 8, 1965, Red Lion requested reconsideration of the Commission's ruling (A., No. 2, 40–43). It argued that the broadcast by Hargis was a response to the article by Cook in *The Nation,* and that fairness did not require a further answer by Cook over WGCB. It reiterated its view that the personal attack facet of the Fairness Doctrine should not require an offer of free time unless the person attacked was unable to pay for the reply. It asked that the Commission clarify, by way of declaratory ruling, the scope of its directive of October 6, and requested a Commission determination of the constitutionality of the Fairness Doctrine as applied to the situation involved.

By letter dated December 9, 1965, the Commission indicated to Red Lion that it adhered to its prior ruling (A., No. 2, 44–49). It rejected Red Lion's argument that the policy on personal attacks was satisfied by an examination of what other media had said on a particular issue. It held that the policy "deals solely with

the particular station and what it has broadcast on the controversial issue of public importance" (A., No. 2, 45). Moreover, the Commission again rejected Red Lion's contention that Cook's financial ability to pay was a relevant consideration. To its previous discussion, it added (A., No. 2, 46):

> There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated program containing a personal attack in a discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances, reasonable opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

Finally, the Commission adhered to its position on the constitutionality of the Fairness Doctrine taken in the *Report on Editorializing*. It summed up the basis of its ruling as follows (A., No. 2, 48–49):

> The ruling provides that if sponsorship is not forthcoming * * * the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the opportunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that

other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's "honesty, character, integrity or like personal qualities."

On petition for review by Red Lion, the Court of Appeals for the District of Columbia Circuit, in an opinion by Judge Tamm (Judge Fahy concurring and Judge Miller not participating), affirmed the Commission's order (A., No. 2, 91–132).[15]

Judge Tamm reviewed the background of the Fairness Doctrine, with particular attention to the personal attack facet thereof, and carefully canvassed the issues presented for decision. He held that the statute contained a permissible and adequately precise delegation of power to the Commission (A., No. 2, 112–117), that neither the Fairness Doctrine generally nor the personal attack aspect thereof was unconstitutionally vague (A., No. 2, 117–122), and that no denial of the right of free speech resulted from their application (A., No. 2, 122–131). Judge Fahy concurred in the result reached by Judge Tamm and in general with his reasoning, without, however, joining in all of the details of the opinion (A., No. 2, 132).

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[15] Previously, the panel had dismissed the petition on the ground that the Commission's ruling was not reviewable, Judge Fahy dissenting (A., No. 2, 82–89). On petition for rehearing *en banc* joined in by all parties, the court of appeals vacated the judgment of dismissal and directed that the case be considered on the merits (A., No. 2, 90).

3. THE RULE MAKING PROCEEDING

On April 6, 1966, shortly after its Red Lion ruling, the Commission issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710 (A., No. 717, 3a–8a) looking toward a codification of its policies on personal attacks and editorializing on political candidates. After reviewing the interpretative rulings on personal attacks set forth in the Fairness Primer, the Commission noted that "the procedures specified have not always been followed even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue" (A., No. 717, 4a.) The Commission stated that a codification of its policy would serve to "emphasize and make more precise licensee obligation in this important area," and would "assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed" (*ibid.*).

The Notice also proposed a rule to implement the Commission's decision in *Times-Mirror Broadcasting Co.*, 24 Pike & Fischer R. R. 404 (1962), with respect to political editorials. The Commission noted that between 1960 and 1964 the number of radio and television stations carrying political editorials had increased, respectively, from 53 and 2 to 103 and 13 (A., No. 717, 6a, n. 3), and that there was "some indication of failure to comply with the corresponding obligation" to afford time to disfavored candidates to answer such editorials (A., No. 717, 6a). The proposed rule was designed to insure that the appropriate candidate be informed of the station's editorial opposing

his candidacy or supporting a rival's, and be given a reasonable opportunity to respond (A., No. 717, 6a–7a).

Written comments in support of and in opposition to the proposed rules were submitted by respondents in the *RTNDA* case, a number of other broadcast licensees, and other interested parties (see A., No. 717, 9a–208a). On July 5, 1967, the Commission issued a Memorandum Opinion and Order adopting the rules substantially as proposed, 32 Fed. Reg. 10303 (A., No. 717, 209a–222a). The Commission reiterated that the new rules did not alter the substance of the previous personal attack and editorializing policies (A., No. 717, 212a–213a); it stated that codification was intended simply to clarify the obligations of licensees and to empower the Commission to impose forfeitures under Section 503(b) of the Act (47 U.S.C. 503(b)) in cases of clear violations which would not warrant the drastic sanction of revocation or nonrenewal of license, but required more than a letter of reprimand (A., No. 717, 210a). Recognizing that situations might arise in which the application of the personal attack rule could entail some uncertainty, the Commission stressed that sanctions would not be imposed where only differences in judgment were involved. It stated that the personal attack rule was expressly directed only toward situations of failure to comply with the prescribed requirements where "there can be no reasonable doubt under the facts that a personal attack has taken place" (A., No. 717, 215a–216a), and noted that the sanctions available under Section 503(b) are

by their terms applicable only to willful or repeated violations of Commission rules (A., No. 717, 210a).

The Commission considered but rejected the contention that the rules would discourage controversial programming. Rather, it pointed out, the rules were intended to implement the Fairness Doctrine's purpose of encouraging controversial programming by insuring that more than one viewpoint on issues of public importance would be heard. The only discouragement to controversial programming would be for a "licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked" (A., No. 717, 216a). As to the claim that the rules resulted in unconstitutional infringements of the rights of free speech and a free press, it noted that the purpose was instead to foster and further robust debate of public issues, citing its discussion in the *Report on Editorializing* and the *Red Lion* decision (A., No. 717, 211a–212a).

Subsequent to adoption, the personal attack rule has been amended twice. On August 7, 1967, the Commission issued a supplementary Memorandum Opinion and Order, 32 Fed. Reg. 11531 (A., No. 717, 223a–227a), exempting bona fide newscasts and on-the-spot coverage of bona fide news events from the ambit of the rule. The Commission took account of the general practice of presenting the reply to a personal attack made in a newscast in the same or a later newscast, and believed that a specific reply requirement in these areas might have a disruptive effect upon the effective execution of the important news functions of licensees and networks (A., No. 717, 223a–224a). Subsequent to the institution of the actions below, and with the per-

mission of the court of appeals, the Commission amended the rule further to exempt bona fide news interviews and commentary or analysis in the course of bona fide newscasts (A., 717, 231a), in another Memorandum Opinion and Order, 33 Fed. Reg. 5362 (A., No. 717, 228a–234a). It did so to avoid any possibility, however speculative, of inhibition in these important areas of broadcast journalism, in accord with the similar congressional policy with respect to equal time for political candidates expressed in Section 315 of the Act (A., No. 717, 233a).

The Court of Appeals for the Seventh Circuit held [16] that the rules unreasonably restrict free speech, and set aside the Commission's order adopting them. It held that the requirements of notice and opportunity for reply imposed excessive economic and practical burdens on the broadcasting of views on controversial issues of public importance and on political editorializing by licensees. In the court's view, these requirements, together with "the omnipresent threat of suffering severe and immediate penalties" for violation of the rules, would lead to licensee self-censorship (A., No. 717, 359a). The court of appeals found "[a]n even greater threat of Commission censorship" in

[16] The new rules were the subject of three separate petitions for review below, in Case No. 16369 by Radio Television News Directors Association, et al. (A., No. 717, 264a–269a), in Case No. 16498 by Columbia Broadcasting System, Inc. (A., No. 717, 270a–277a), and in Case No. 16499 by National Broadcasting Company, Inc. (A., No. 717, 284a–289a). The latter two petitions were transferred from the Second Circuit pursuant to 28 U.S.C. 2112, and the cases were consolidated in the Seventh Circuit by order of October 24, 1967.

what it considered insufficient specificity as to when the obligation of notice and opportunity for reply arises, compelling licensees to consult the Commission to determine their obligation in borderline cases (A., No. 717, 360a). The court declined to recognize any distinction between the broadcast press and the printed press with respect to the obligations that might be imposed on the former by the Commission. In view of its decision on the First Amendment question, the court did not reach the question whether Congress had authorized the Commission to promulgate such rules (A., No. 717, 371a).

SUMMARY OF ARGUMENT

Unlike other media of expression, broadcasting is "inherently not available to all" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226). Because of this unique characteristic, and since broadcasters utilize the public airwaves, radio has long been subjected to governmental regulation in the public interest. One important aspect of this regulation has involved the development by the Federal Communications Commission of the so-called Fairness Doctrine, under which broadcast licensees are required to present opposing views on public issues. That doctrine received explicit congressional sanction in 1959 when, in amending Section 315 of the Communications Act, Congress confirmed the broadcasters' obligation "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The same considerations which have supported this

Court's previous rejections of First Amendment challenges to Commission regulation of broadcasting remain viable and support the Fairness Doctrine. Until the Seventh Circuit's decision in *RTNDA*, no court had suggested that the First Amendment was violated by Commission action to insure the preservation of broadcasting as a medium open to full debate on public issues. Nor is it enough, particularly as to broadcasting, to leave the matter of airing opposing views on important questions simply to the "marketplace of ideas." That marketplace is increasingly one for the affluent and powerful. It is essentially to effectuate a right of access to the broadcasting medium to serve the public interest in hearing both sides of public issues that the Fairness Doctrine was evolved by the Commission. That doctrine, as a general principle, is plainly within the Commission's statutory authority. Moreover, it suffers from no constitutional infirmity, but rather seeks affirmatively to foster the public interest in free and robust debate of significant issues which is central to the First Amendment.

Both the personal attack and political editorializing rules involved in *RTNDA* seek to implement the Fairness Doctrine. Prior to the adoption of the formal rules, the Commission had applied a personal attack policy on an *ad hoc* basis in individual cases of which *Red Lion* is an example. The essential elements of that policy—giving notice of an attack, providing a tape

or script, and offering reply time—were set out in the so-called Fairness Primer published by the Commission in 1964, and were simply codified in the new rule. That policy was properly upheld by the D.C. Circuit in *Red Lion*, and incorrectly invalidated by the Seventh Circuit in *RTNDA*. Neither the rule nor the previous policy have been shown to be unduly burdensome for broadcast licensees or to result in the inhibition of speech. Nor are the requirements of the rule so imprecise or vague as to be vulnerable to constitutional challenge. The added sanctions available to the Commission under the rule do not render it invalid, but simply give the Commission a more credible and effective mechanism for effectuating the underlying policy. The personal attack rule is directed in any event at a narrow class of cases—attacks on individuals or groups occurring "during the presentation of views on a controversial issue of public importance." Certain classes of news programs have been specifically exempted from the rule's coverage, to alleviate any possible concern that interference with such programming might result. And the Commission has made it clear that sanctions will be imposed only for willful or repeated violations of the rule.

Contrary to the suggestion of the court of appeals in *RTNDA*, nothing in this Court's decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, requires invalidation of the personal attack rule on First Amendment grounds. *New York Times* and its prog-

eny are in any event not directly relevant, since the basic thrust of the rule is to protect the public's access to conflicting views on public issues, not to penalize the broadcaster or to provide private redress such as that provided for by libel laws. If anything, these cases support the Commission's action here.

The Seventh Circuit acted improperly in striking down the rule on its face, since in doing so it effectively substituted its judgment for that of the agency charged by Congress with the regulation of broadcasting regarding the appropriate solution to the problems presented in this area. Instead of invalidating the rule on the basis of speculation that it might be burdensome or inhibiting, the court below should have allowed the rule to operate for a time and permitted the Commission to adjust the rule, if necessary, as experience develops further. Ample opportunity will exist for the courts to remedy any defects in or improper application of the rule.

The political editorializing rule, involved only in *RTNDA,* is similarly valid. It is directed to a matter of vital public concern, and is precise and explicit in the requirements it prescribes. Moreover, any burdens incident to compliance therewith are quite attenuated. Accordingly, the editorializing rule, like the personal attack rule, is in no way inconsistent with the First Amendment.

ARGUMENT

I

THE FAIRNESS DOCTRINE UNDERLYING THE POLICIES AND RULES HERE INVOLVED CONSTITUTIONALLY REFLECTS THE PUBLIC INTEREST IN FAIR ACCESS TO THE MEDIUM OF BROADCASTING

The policy on personal attacks applied in *Red Lion* and the rules on personal attacks and political editorials involved in *RTNDA* are facets of the general principle that broadcasters have affirmative responsibilities to present conflicting views on controversial issues of public importance. This general principle, which has come to be known as the Fairness Doctrine, is closely related to the statutory prescriptions of Section 315 of the Communications Act on broadcasting by political candidates, and has itself received statutory recognition.[17] While the opinion of the Seventh Circuit in *RTNDA* disavowed any holding that the Fairness Doctrine might contravene the First Amendment, it was so argued below and the court's invalidation of the Commission's rules necessarily casts doubt upon the viability of this underlying principle.

The Fairness Doctrine—and in particular the aspects thereof attacked in these cases—does not restrain or punish any statement that might be made on the air; rather, its whole purpose is to open the airwaves to freer speech, to a diversity of views. Viewed objectively, the position underlying the attacks on the Commission's reply policies and rules

[17] 47 U.S.C. 315(a) (see *infra*, p. 66).

is simply that a broadcast licensee has a constitutional right to deny the public access to views with which he disagrees, or which he finds it unprofitable to broadcast. This position is unacceptable in relation to a medium whose special nature requires that control over available channels of expression be restricted, by governmental licensing, to a limited number of persons. We believe, with the District of Columbia Circuit, that corollary governmental action to preserve access to the broadcast medium for the expression of opposing viewpoints—far from being unconstitutional—serves the same interest in keeping the channels of communication open that underlies the First Amendment.

The Communications Act evinces the purpose of Congress "to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority * * *" (47 U.S.C. 301). The standard adopted to govern such use is the "public convenience, interest, and necessity" (47 U.S.C. 307(a), 309(a), 310(b)). See, *e.g.*, *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U.S. 266, 285. "Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license" (*Regents of the University System of Georgia* v. *Carroll*, 338 U.S. 586, 598).[18] And this Court

has observed that "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138).

Over 25 years ago, in sustaining the validity of the Commission's Chain Broadcasting regulations, this Court rejected the contention that the First Amendment restricted the regulation of broadcasting in the public interest to the merely technical characteristics of radio transmission. *National Broadcasting*

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[18] While "[t]he Commission is given no supervisory control of the programs, of business management or of policy," since "the Act does not essay to regulate the business of the licensee," it is nevertheless "the ability of the licensee to render the best practicable service to the community" which forms "[a]n important element of public interest and convenience affecting the issue of a license" (*Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475).

See also *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.), sustaining denial of renewal of a license used largely in aid of the licensee's pharmaceutical business. The court stated (47 F. 2d at 672): "When Congress provided that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast band for every business or school of thought."

* * *

Co. v. *United States,* 319 U.S. 190, 226–227. The Court explained that (*id.* at 226):

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. *Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.* Because it cannot be used by all, some who wish to use it must be denied. * * * [Emphasis added.]

And this Court has noted in a related context that not every medium of speech is "necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems" (*Burstyn* v. *Wilson,* 343 U.S. 495, 502–503; see also Mr. Justice Frankfurter and Mr. Justice Jackson concurring in *Kovacs* v. *Cooper,* 336 U.S. 77, 89, 97). As was stated in *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994, 1003 (C.A. D.C.):

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. * * *

Nonetheless, the Seventh Circuit's opinion in *RTNDA*, taking as its premise that the personal attack and political editorializing rules (and with them the policy applied in the *Red Lion* ruling, see A., No. 717, 363a–365a) "would be in flat violation of the first amendment if applied to newspaper publishers," answered in the negative the question "whether the need for technical, financial and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers * * *" (A., No. 717, 366a). That equating of broadcast licensees and newspapers is, we submit, unwarranted.

The Seventh Circuit made much of figures showing that the gross number of radio and television stations in the United States now exceeds the number of general circulation daily newspapers, thereby implying that it makes no constitutionally cognizable difference to a viewer or listener whether any station by itself provides a fair balance of views. But this raw comparison of numbers is highly misleading. It ignores the great number—and wide circulation—of printed materials other than daily newspapers, such as weekly newspapers, magazines and books. It blinks the fact that, in the case of most television and much radio broadcasting, the programming received by the public, however many stations it may be tuned to, emanates primarily from a handful of network sources. It ignores the physical limitations on the service area of any particular station—which restrict a particular viewer or listener to reception of a small number of stations; on the other hand, there is no such limit on the number of persons

who may obtain or be reached by a piece of printed material. And it disregards the fact that the amount of material a radio or television station can transmit is restricted by the number of waking hours in the day—as well as by broadcasters' economic interests in devoting as many as possible of those hours to entertainment programming—whereas such restrictions do not exist as to the number of pages that a newspaper or other printed matter can contain.[19]

Most important, the Seventh Circuit's emphasis on the number of broadcast outlets loses sight of the fun-

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[19] Just recently, in *Banzhaf* v. *Federal Communications Commission*, No. 21,285, decided November 21, 1968, the D.C. Circuit, in discussing broadcasting and the printed press, noted that there may be "a meaningful distinction between the two media justifying different treatment under the First Amendment." That was so, it suggested, because (slip op., pp. 32–33)

> [u]nlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets. Moreover, * * * [w]ritten messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air."

It should be noted that the D.C. Circuit's decision in that case, upholding the applicability of the Commission's Fairness Doctrine to cigarette advertising carried by broadcasters against, *inter alia*, First Amendment challenge, is being contested in this Court by a number of parties to that proceeding below (*e.g.*, *The Tobacco Institute* v. *Federal Communications Commission*, pending on petition for certiorari, No. 1036, this Term).

damental point that there are not enough of them to satisfy the demand of those who would be broadcasters. The crucial consideration is that "[t]he facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216). And, despite the view of the Seventh Circuit to the contrary (A., No. 717, 366a–367a), the available frequency spectrum, which must accommodate many uses of radio in addition to broadcasting, remains inadequate to meet existing demands, and new demands for spectrum space are constantly developing.[20] Within the broadcast field, in addition to the continuing need for regulation to prevent destructive electrical interference among stations, there is still a greater demand than there is availability of frequency space. The Commission's 1966 Annual Report thus speaks of "growing congestion" in the AM band (*id.* at 6). During 1967 there were 73 comparative hearings in the broadcast field involving two or

[20] The Director of Telecommunications Management, in an October 1966 Report on Frequency Management within the Executive Branch of the Government, stated (p. 13): "The rapid rate of growth in the use of the radio spectrum has exceeded, by a substantive margin, the increase in the allocated spectrum, our capability to use the higher frequencies, our technology, and our administrative methods and facilities. In fact, technology has created desire for additional uses faster than it has produced means to solve the problem of electromagnetic congestion. The part of the spectrum that we have learned how to use is now fully allocated to important civil and Government needs and is congested in key parts."

more applicants for the same frequency.[21] While economic conditions in some communities will not now support the new stations for which frequencies have been allocated, the demand in large communities presently exceeds the available space. The fact that there are some unused frequencies in areas of low population density, which has always been the case, does not alter the need for, or the nature of, governmental regulation of broadcasting in the public interest. Today, as before, a radio frequency is a scarce resource which must be apportioned among a limited group of users.

Thus, contrary to the Seventh Circuit's decision, the basis for congressional regulation of radio remains essentially the same as was the case when this Court examined the matter in *National Broadcasting Co.* v.

[21] For example, when the Commission revoked the license of AM station KRLA in Pasadena, California, there were 16 applications by parties seeking to use the vacated frequency. Docket No. 15752, designated for hearing on December 31, 1964, 30 Fed. Reg. 168. Eight applications were filed for St. Louis, Missouri, when the license of AM station KWK was revoked. Docket No. 17209, designated for hearing on February 21, 1967, 32 Fed. Reg. 3305. In a case recently decided by the District of Columbia Circuit, eight competing applicants challenged the grant to a ninth party of a permit for a new television station in Rochester, New York. *Star, Television, Inc.* v. *Federal Communications Commission*, No. 21,277, decided January 30, 1969. When the license of television station KSHO-TV, Las Vegas, Nevada, was rescinded, 7 parties sought the frequency. Applications are pending, but have not yet been designated for hearing. Similarly, six competing applicants have filed for a new UHF channel made available in Anaheim, California. That channel was added in August 1967 (32 Fed. Reg. 9815), and was designated for hearing in Docket No. 18295, *et al.*, on August 21, 1968, 33 Fed. Reg. 12591.

United States, 319 U.S. 190, 226 (see *supra*, pp. 43–44). In that case the Court found no constitutional infirmity in the Commission's rules prohibiting network contracts that restricted public access to programming. It did not find it necessary to consider whether some governmental agency might similarly restrict the power of newspapers to contract; nor did it object that the rules went beyond "technical, financial and ownership regulation," as did the Seventh Circuit here (A., No. 717, 366a). The interest of the public in the discussion of public issues constitutes one of the main premises upon which so much spectrum space has been allocated to broadcasting. *Farmers Union* v. *WDAY*, 360 U.S. 525; *Report on Editorializing*, 13 F.C.C. at 1249. This factor, and the special nature of broadcasting recognized in *National Broadcasting Co.*, provide ample constitutional justification for the Fairness Doctrine in general and as applied in these cases.[23]

It may be that the Congress—and its delegate, the Commission—could leave it to chance, as the Seventh Circuit suggested (A., No. 717, 369a), that the public

[23] In addition, it is our view that the Seventh Circuit treated the notion that the airwaves were imposed with a public trust (see, *e.g.*, *McIntire* v. *Wm. Penn Broadcasting Co.*, 151 F. 2d 597 (C.A. 3), certiorari denied, 327 U.S. 779), in too cavalier a fashion. It seems clear that the public generally has an important interest in the appropriate use of this valuable asset—the ability to communicate through the airwaves to the public at large. Congress has recognized this in establishing an agency to regulate broadcasting in the public interest, and in conferring on that body broad powers to accomplish that objective (see 47 U.S.C. 301, 309(h)).

will be adequately informed on both sides of controversial issues even if broadcast stations do not properly serve this function. But the question is whether government is constitutionally required to pursue such a course. Clearly, it is not.[23] If the matter were left to chance, it is difficult to see how the audiences of the stations which carried the attack upon Fred J. Cook could have any opportunity to hear his response. Perhaps he could write another book, but that is hardly the ideal solution. Newspapers do not ordinarily duplicate the service areas of particular broadcast stations, assuming they would print such a response. And the local media in particular locations may also tend to present a common view on particular issues.[24] Conversely, the Fairness Doctrine reasonably prevents such a blocking of controversial views, and does so, it is important to emphasize, through Commission rulings which can only serve to open a way for views otherwise denied access to the public.

[23] Chafee, in *Government and Mass Communications* (1947), relied upon by Red Lion (Br. 18, 23, 34), believed (Vol. II, p. 638) that the "FCC is the one department of the government which probably has the power to compel some measure of broadmindedness." However, while he thought it might be possible to give frequencies to proponents of particular views (*id.* at 642–643), it is now clear that if broadcasting may constitutionally be kept open to robust debate, it cannot be done by granting licenses upon the basis of political or social orientation. This would not only be impractical, "[b]ut Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190. 226).

[24] The Commission's records showed that as of the first of this year there were 1522 communities with only one radio station.

Prior to the Seventh Circuit's decision in *RTNDA*, no court had suggested that the First Amendment was affronted by the proposition that the Commission could act to preserve broadcasting as a medium open to full debate on public issues. On the contrary, the District of Columbia Circuit had presaged its *Red Lion* decision in two cases making clear its view that the public interest required fairness on the part of broadcast licensees. In *Noe* v. *Federal Communications Commission*, 260 F. 2d 739, 743 (C.A.D.C.), certiorari denied, 359 U.S. 924, in response to the contention that an applicant might not treat other religious faiths fairly, it was stated that should the applicant "in the future fall short of the rules and regulations of the Commission in regard to proper programming, the Commission may always review the matter in a renewal proceeding or otherwise." In another case involving allegations of consistent unfairness in the treatment of issues relating to race relations, the same court stated that "adherence to the Fairness Doctrine is a *sine qua non* of every licensee." *Office of Communication of United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994, 1009 (C.A.D.C.). Moreover, in *Red Lion* itself, the court noted that, under the Fairness Doctrine, licensees "are not prohibited from broadcasting any program which [they] think suitable. * * * [They] are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting" (A., No. 2, 119).

Congress and the Commission thus may constitutionally protect the public's interest in the use of the available channels of communication, and the Fairness Doctrine constitutes a clearly appropriate implementation of the First Amendment's basic purpose. It has developed out of recognition of the import of the fact that with respect to this medium of speech, as with no other, the government necessarily affords to some, and denies to all others, the right of access to the public. The contention that the government lacks the power to preserve these scarce channels as avenues of expression open to conflicting viewpoints on significant public issues is amply answered by this Court's response to a similar contention in *Associated Press* v. *United States,* 326 U.S. 1, 20:

> It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment * * * here provides powerful reasons to the contrary. *That amendment rests upon the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.* Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means

> freedom for all and not for some. * * * Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. * * * [Emphasis added.][25]

This Court has articulated in case after case that the essence of the First Amendment's protection of free speech and a free press is to protect the public generally, and not the parochial interests of the news media. It has been increasingly recognized that the interests of the public which the First Amendment seeks to foster are not in every case necessarily served by simply relying upon an unregulated "marketplace of ideas." That marketplace is increasingly one for the affluent and powerful, and some voices may accordingly seldom, if ever, be heard. Here the broadcasters and the Seventh Circuit have placed considerable reliance on this Court's decision in *Mills* v. *Alabama,* 384 U.S. 214. But they have entirely overlooked one significant point made toward the conclusion of the Court's opinion in that case, where the Court noted that "[*b*]*ecause the law prevents any adequate reply* to ["last-minute"] charges, it is wholly ineffective in protecting the electorate" from confusion in exercising the franchise (*id.* at 220; emphasis added). Other courts have similarly emphasized the

[25] As Professor Meiklejohn aptly stated, the First Amendment is directed against "mutilation of the thinking process of the community," for "[j]ust so far as, at any point, the citizens who are to decide issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to those issues, just so far the result must be ill-considered, ill-balanced planning for the general good." Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, on S. Res. 94, 84th Cong., 2d Sess., p. 5.

importance of access to media of expression. In the district court opinion in the *National Broadcasting Co.* case, Judge Learned Hand stated (*National Broadcasting Co.* v. *United States,* 47 F. Supp. 940, 946 (S.D.N.Y.), affirmed, 319 U.S. 190):

> We agree that the [Chain Broadcasting] regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

In like vein, Judge Hand noted in *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y.), affirmed, 326 U.S. 1, that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." The Commission has properly concluded that "a multitude of tongues" may not in fact be voiced if broadcasters are wholly unregulated regarding their presentation of controversial issues of public importance. Its policy properly reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270). Judge Bazelon stated the concept perceptively in the D.C. Circuit's recent opinion in *Banzhaf* v. *Federal Communications Commission,* No. 21,285, decided November 21, 1968, slip op., p. 36:

> * * * A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance. That policy has been pursued by a general hostility toward any deterrents to free expression. *The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often.* Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to

the mass communications media is not a fair test of either an argument's truth or its innate popular appeal. [Emphasis added.][26]

The matter of access of the public, or, more precisely, those elements of the public with responsible ideas warranting a general airing, to the news media in general has been given increasing attention by the commentators. See Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L.Rev. 1641 (1967); Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447, 505–528 (1968).[27] The central thesis of the Barron article is that some ideas are unable to obtain access to the media of mass communication, and that therefore it is appropriate to reexamine certain of the premises on which First Amendment theory is grounded. There is no need here to explore the outer limits of the

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[26] Moreover, in the *Red Lion* case itself, Judge Tamm stated that the Fairness Doctrine, "rather than limiting the [broadcasters'] right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast" (A., No. 2, 120). We recognize that Judge Fahy, in concurring, noted that he had "doubts" about the soundness of this proposition (A., No. 2, 132). Perhaps Judge Tamm's focus on the right of "the victim" as an individual is what disturbed Judge Fahy. We assume, however, that the notion Judge Tamm was seeking to express is identical to that of Judge Bazelon in the *Banzhaf* case, and that he thought of "the victim" as a spokesman for the opposing point of view rather than simply an individual seeking personal vindication.

[27] See also Note, *Regulation of Program Content by the FCC*, 77 Harv. L. Rev. 701, 714 (1964).

theme there suggested,[28] for the instant cases involve at most an application of the notion to the field of broadcasting—a field already subject to substantial governmental regulation to further the public interest.

Unlike the Barron article, which deals with news media generally, the Barrow article focuses more specifically on the medium of broadcasting with which we are here concerned. Citing Judge Hand's opinion in the *National Broadcasting Co.* case (see *supra*, pp. 54–55), Barrow suggests that "the freedom of speech of the listeners and viewers" must be given primary consideration in the broadcasting context (37 U. Cin. L. Rev. at 506–507). He proceeds to point out that, "[e]xcept for the recent decision of the court of appeals in the *RTNDA* case, no judicial decision has been found in which a court has held that the Commission's concern with program service in the public interest contravened the first amendment" (*id.* at 510), and concludes that "[p]ermitting a person to reply to a personal attack upon him is [itself] an exercise of free speech" (*id.* at 528).

If the essential purpose of the First Amendment is kept in mind, it follows that broadcasters have an inherent responsibility to serve the public by affording access to conflicting and divergent views on issues of public importance. Indeed, it is peculiarly in this gov-

[28] A number of this Court's decisions have sought to protect and implement a rather general right of access on behalf of elements of the public whose ideas might not otherwise be promulgated. See, *e.g.*, *Staub* v. *City of Baxley*, 355 U.S. 313; *Martin* v. *Struthers*, 319 U.S. 141; *Schneider* v. *State*, 308 U.S. 147.

ernmentally regulated field of broadcasting that the predicates and machinery for effectuating such a right of access exist. The Commission's Fairness Doctrine is designed to serve this goal, and the Seventh Circuit's undermining of that general principle should not be allowed to stand.

II

THE PERSONAL ATTACK RULE—LIKE THE RULING IN RED LION—IS A VALID EXERCISE OF THE COMMISSION'S REGULATORY POWERS AND DOES NOT OFFEND THE FIRST AMENDMENT

The Commission's personal attack rule was designed, as the Commission stated in the adopting Memorandum Opinion and Order, "to effectuate important aspects of the well established Fairness Doctrine" by clarifying and making "more precise the obligations of broadcast licensees where they have aired personal attacks" (A., No. 717, 210a). The rule does not "proscribe in any way the presentation by a licensee of personal attacks," but provides for "appropriate notification steps and * * * an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint" (A., No. 717, 212a). Sanctions (consisting of monetary forfeitures of up to $10,000) may be imposed, but only for "willful or repeated violation" of the rule (A., No. 717, 210a).

The ruling under review in *Red Lion* involved an *ad hoc* application of the same principles and procedures subsequently codified in this rule. There the

Commission found that the personal attack policy had been violated, but did not purport to impose any sanction upon the station. The D.C. Circuit found neither a lack of constitutional validity nor a want of statutory authority to issue such a ruling. It recognized that the reply requirement "may, and probably does, impose a burden on the licensees," but it found the burden "not an unreasonable one" (A., No. 2, 124). This was so, it concluded, since "broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust" (*ibid.*). Moreover, that court found the various aspects of the policy "sufficiently explicit to inform those who are subject to them" what they are required to do and when the doctrine is triggered (A., No. 2, 122).

In *RTNDA,* however, the Seventh Circuit held that the personal attack rule violates the First Amendment. The court concluded that the rule places impermissible burdens upon licensees likely to constrict their choice of programming (A., No. 717, 362a), and that the Commission had failed to demonstrate that the aims of the rule could not be achieved by less restrictive means (A., No. 717, 369a). Having invalidated the rule on constitutional grounds, the court found it unnecessary to determine whether promulgation of the rule was within the Commission's statutory power (A., No. 717, 371a).

It is our position that the personal attack rule, as a codification of the previous policy applied in indi-

vidual cases, including *Red Lion,* suffers from neither statutory nor constitutional infirmity. We endeavor to show that the Commission is vested with ample authority to adopt rules designed to secure the public interest in fairness in broadcasting, that the rule here in issue serves that legitimate purpose, and that the rule as framed does not infringe First Amendment rights of broadcast licensees.

A. THE PERSONAL ATTACK RULE IS A VALID EXERCISE OF THE COMMISSION'S RESPONSIBILITY TO REGULATE BROADCASTING IN THE PUBLIC INTEREST

Federal regulation of radio communications began in 1910, when radio broadcasting was in its infancy and television was unknown (*National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210). By 1927, when the Federal Radio Commission was established and the predecessor of the Communications Act of 1934 was adopted, the rapid and largely uncontrolled growth of radio posed a serious threat to the utility of a valuable national asset. In conferring regulatory responsibility upon the Commission, "Congress was acting in a field * * * which was both new and dynamic," and "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers" (*id.* at 219). Guided by the standard of "public interest, convenience, or necessity," the Commission was charged by Congress with furthering "the interest of the listening public in 'the larger and more effective use of radio'" (*id.* at 216).

An important aspect of the congressional scheme of regulation was "to develop broadcasting as a political outlet" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 535; 47 U.S.C. 315(a)). In furtherance of this interest, the Commission has encouraged the use of the medium for "the presentation of news and programs devoted to the consideration and discussion of public issues" (*Report on Editorializing*, par. 6, p. 1249). It was inevitable that the use of radio for "uninhibited, robust, and wide-open" "debate on public issues" (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270) should pose the question of the appropriate treatment of personal attacks. As this Court had earlier noted, "In the realm of * * * political belief, sharp differences arise [so that to] persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification * * * and even to false statement" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 310). The Commission's experience confirmed the view that personal attacks are often resorted to as a tool of persuasion in the discussion of public issues (see, *e.g.*, Fairness Primer, pars. 20–27), and the Hargis broadcast which provoked the complaint in *Red Lion* affords a not untypical example of the problem.

In seeking to apply principles of fairness to the special problem raised by personal attacks in the presentation of one side of important public issues, the Commission affirmatively sought to further and foster the full and robust debate of such matters. It has long recognized that official action designed to prevent such attacks would not only exceed its proper function but

would also defeat the basic purpose of encouraging free speech.[29] Thus the Commission has sought rather to insure simply that licensees afford those attacked in such discussions an opportunity to respond, to the end that the public may be completely informed—the cardinal objective of the Fairness Doctrine. Initially, the Commission pursued this objective on an *ad hoc*

[29] The Commission has consistently emphasized this point in word and deed. See, *e.g.*, *Report on Editorializing*, 13 F.C.C. 1246, 1247–1248 (1949); *Pacifica Foundation*, 36 F.C.C. 147, 149 (1964); *Anti-Defamation League of B'nai B'rith*, 4 F.C.C. 2d 190, 191 (1966), affirmed, *Anti-Defamation League* v. *Federal Communications Commission*, 403 F. 2d 169, 170 (C.A.D.C.), pending on petition for certiorari, No. 990, this Term, in which the Commission refused to find a licensee disqualified upon the basis of anti-Semitic remarks, stating:

> The Commission has long held that its function is not to judge the merit, wisdom or accuracy of any broadcast discussion or commentary but to insure that all viewpoints are given fair and equal opportunity for expression and that controverted allegations are balanced by the presentation of opposing viewpoints. Any other position would stifle discussion and destroy broadcasting as a medium of free speech. To require every licensee to defend his decision to present any controversial program that has been complained of in a license renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantial group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.

In the face of this history, it is difficult to understand the basis for the view of the Seventh Circuit (A., No. 717, 359a) that "[a]pparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest."

basis, and in response to specific complaints it articulated the central elements of its policy—notice of the attack to be given and reply time to be offered.[30]

However, the Commission's experience demonstrated that reliance upon licensee compliance with the general standard of the Fairness Doctrine was not a satisfactory method of treating the personal attack problem. While the Commission could acquaint licensees with their responsibilities in such cases (as it sought to do in the Fairness Primer), there were grounds to doubt that they were being faithfully observed. For example, the attack in *Red Lion* was in a syndicated program carried by numerous stations, only one of which notified Cook of the attack (A. No. 2, 26),[31] and even that station insisted upon payment as a condition of offering time for reply (A., No. 2, 26, 27).[32]

The Commission reasonably concluded that licensees' demonstrated failure to comply with their obligations under the Fairness Doctrine in the personal attack area was traceable in substantial part to the lack of appropriate sanctions for noncompliance.

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[30] These same basic elements were summarized in the Fairness Primer in 1964 and were later codified in the personal attack rule involved in *RTNDA*.

[31] Moreover, in the course of his unproductive efforts to obtain reply time through his own efforts, Cook learned for the first time of similar attacks of which no notice had been given (A., No. 2, 27).

[32] For further indication of the Commission's experience with personal attack problems, see the following published rulings: *In re application of Clayton W. Mapoles*, 23 Pike & Fischer R. R. 586 (1962); *Letter to Billings Broadcasting Co.*, 23 Pike & Fischer R. R. 951 (1962); *Letter to Richard B. Wheeler*, 6

The Commission could hold out only the threat of ultimate nonrenewal of the license, but this was plainly not a suitable response to a violation by a licensee whose performance over the three-year license term otherwise adequately served the public interest. Of course, a consistent pattern of broadcasting personal attacks without taking steps to afford reasonable opportunity to respond might warrant the conclusion that the licensee had failed to operate in the public interest, but such a pattern might be difficult to detect and establish. The Commission does not, and as a practical matter cannot, monitor the programming of licensees; it can learn of personal attacks only when an interested party, most likely the person attacked, brings them to its attention. Thus a licensee who

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F.C.C. 2d 599; *Radio Denver, Inc.*, 5 Pike & Fischer R. R. 2d 570 (1965); *Letter to Mr. Tony Kehl*, 1 F.C.C. 2d 936 (1965); *Letter to Stations KBHC, KVIN, WJBS and WNKY*, 1 F.C.C. 2d 935 (1965); *Letter to Stations KBEN and WEYY*, 1 F.C.C. 2d 933 (1965); *Letter to Grand Canyon Broadcasters*, 1 F.C.C. 2d 931 (1965); *Letter to Garrett Broadcasting, Inc.*, 1 F.C.C. 2d 929 (1965); *Letter to Susquehanna Broadcasting Co.* (WEDR–FM), 10 Pike & Fischer R. R. 2d 448 (1967); *Letter to Seminole Broadcasting Co.* (WSWN), 10 Pike & Fischer R. R. 2d 449 (1967); *In re Application of Capitol Broadcasting Company, Inc.* (WRAL), 8 F.C.C. 2d 975, 10 Pike & Fischer R. R. 2d 579 (1967); *In re Petition to Revoke License of Springfield Television Broadcasting Corporation* (*WRLP*), 4 Pike & Fischer R. R. 2d 681 (1965); *Letter to Mid-Florida Television Corporation*, F.C.C. 64–863, Sept. 16, 1964, unreported; *Letter to Capital Broadcasting Corporation, Inc.*, 2 Pike & Fischer R. R. 2d 1104 (1964); *Telegrams to Times-Mirror Broadcasting Company*, 24 Pike & Fischer R. R. 404, 24 Pike & Fischer R. R. 407 (1962); *Letter to Radio Albany, Inc.* (*WALG*), 4 Pike & Fischer R. R. 2d 277 (1965); *Letter to the McBride Industries, Inc.*, F.C.C. 63–756, July 30, 1963, unreported.

ignored the notice requirement would not only tend to prevent timely response to the attack, but would make it unlikely that his consistent noncompliance with Commission policy could be documented at license renewal time.

Section 503(b) of the Act provides, however, for the imposition of monetary forfeitures for willful disregard of a Commission rule. Thus, by codifying the personal attack policy into a formal rule, the Commission reasonably intended to promote fairness in the personal attack area by arming itself with a sanction less harsh, and thus more credible, than loss of license. Moreover, although all the components of the licensees' personal attack responsibilities had been spelled out previously in public statements, the Commission's experience indicated widespread uncertainty regarding, or simply disregard of, those duties. Therefore, an additional important objective of formal codification was to "clarify and make more precise the obligations of broadcast licensees" (A., No. 717, 210a).

In view of these problems, and the Commission's general statutory obligations as they have been interpreted by the courts, there can be no doubt that both the ruling against Red Lion and the personal attack rule as subsequently adopted were well within the Commission's authority and obligation "as public convenience, interest, or necessity requires, * * * [to] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Act of 1934] * * *" (47 U.S.C.

303)."[33] And any doubt as to the statutory authority for the underlying Fairness Doctrine was removed by Congress's explicit endorsement of the doctrine in the 1959 amendment to Section 315 (see *supra*, pp. 17–22; *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994, 999, n. 5 (C.A.D.C.)). Any fair reading of the language of Section 315(a) places the obligation on licensees to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[34] That the wording of the amendment is in the form of a recognition of an existing obligation does not detract from its relevance here.

B. THE PERSONAL ATTACK RULE DOES NOT UNCONSTITUTIONALLY BURDEN FREE EXPRESSION BY LICENSEES

In holding that the First Amendment prohibits adoption of the personal attack rule, the Seventh Circuit found that the rule "pose[s] a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on * * * controversial issues of public importance" because it is economically and practically burdensome, vague, and accompanied by specific sanc-

[33] Moreover, Section 303(g) mandates the Commission to "generally encourage the larger and more effective use of radio in the public interest." To the same end, Section 308(b) authorizes the Commission to consider "the citizenship, character, and financial, technical, and other qualifications" of applicants for station licenses, and also "the purposes for which the station is to be used."

[34] See also Section 315(c), which authorizes the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

tions (A., No. 717, 357a). We submit that these criticisms are unjustified. Rather, the rule (and the policy applied in *Red Lion*) is calculated to enhance the listening public's exposure to contrasting views on controversial subjects. And it is not so imprecise or vague that licensees will be forced to choose between curtailing controversial programming or risk incurring penalties for violating the rule.

At the outset, we stress that the rule is directed only at a relatively narrow class of cases. First, it applies only to attacks occurring "during the presentation of views on a controversial issue of public importance." Thus, no licensee need fear that the rule may be triggered by purely personal attacks in which the public at large has little interest. Second, the Commission has expressly exempted certain classes of programs, including on-the-spot coverage of news events, bona fide newscasts (along with commentary and analysis carried therein) and news interviews, from the coverage of the rule, both because they did not generally give rise to the problems at which the rule is primarily directed and in order to alleviate any possible concern that the rule might unduly interefere with such programming. In this regard, the rule largely follows the pattern set by Congress in Section 315 with respect to exemptions from the "equal time" requirement relating to political candidates.[35]

[35] The primary differences are that Section 315(a) prohibits any licensee censorship, and requires "equal opportunities" for candidates, while the rules require only a reasonable opportunity to respond. So too, a political candidate may be required to pay if his opponent paid for his time. The personal attack rule

The heart of the personal attack rule is the requirement that the licensee give notice and a copy or summary of the attack to the person or group attacked and offer an appropriate opportunity to respond. This procedure is clearly necessary if the listening public is to hear a timely and responsive reply.[36] While the Seventh Circuit asserted that these requirements impose "substantial economic and practical burdens" on licensees, it failed to elaborate any reasons in support of its conclusion. The cost of providing notice and a

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exempts very much the same classes of news programs as Section 315(a), except for the news documentary, as to which Section 315(a) gives an exemption if a candidate's appearance is incidental to the main subject matter. Since a documentary is assembled over a period of time, the Commission saw no problem here warranting an exemption (A., No. 717, 336a–337a). A program prepared very quickly to cover a fast-breaking development might very well be an exempt special newscast. In this regard, the Seventh Circuit's criticism of the Commission for endeavoring to follow the line drawn by Congress in Section 315 as to exemptions (see A., No. 717, 362a, n. 38) seems wide of the mark. While the problem of equal time for political candidates and the problem of personal attacks and political editorials are distinguishable, they are nonetheless closely related. Thus, the Commission cannot be taken to task for attempting to track Section 315(a)'s exemptions in delineating programs not covered by the personal attack rule, particularly since that section provides the statutory basis for the Commission's action. Indeed, the Seventh Circuit's rationale here raises serious questions about the constitutionality of Section 315(a) itself, as well as the Commission's rules.

[36] There is here an obvious difference from the situation presented by an attack printed in a newspaper or magazine. While the printed attack is always available as a permanent record of what was said, there is ordinarily no way for the object of a broadcast attack to know exactly what was said unless the broadcaster provides a tape or script.

copy of an occasional attack is plainly not substantial. No licensee is obliged to do more than make a reasonable effort to locate the person attacked. If a script or tape of the attack is available, it can readily be forwarded to the person involved; if no script or tape is at hand, furnishing a summary satisfies the licensee's obligation.

Nor is the requirement that response time be offered an undue burden. First, the rule accords the licensee wide discretion to determine the amount of time suitable to a particular response and to schedule the response so as to minimize disruption of program schedules. Second, in many instances the person attacked will decline to exercise the right of response. Third, a licensee is free to seek sponsorship for the reply. The soundness of the Commission's refusal to make the right to reply conditional on the willingness or inability of the person attacked to purchase time is plain. In *Red Lion,* the attack complained of was made on a syndicated program, carried on numerous stations. If a person attacked on such a syndicated program or on a network program (particularly a television program) were required to buy time to respond, the opportunity to reply would be nullified in practice and the public's interest in hearing it would not be served. For this reason, the Commission has properly decided that a station may not leave the public uninformed simply because sponsorship or payment by the person or group attacked is not forthcoming (A., No. 2, 39, 48).

Although respondents in *RTNDA*, both before the Commission and the court below, raised the spectre of insurmountable practical difficulties, they at no time attempted to give content to these fears.[37] The contrast with the objections actually raised by one licensee faced with a concrete personal attack situation is instructive. In *Red Lion*, the licensee never, in its correspondence with the complainant and the Commission, suggested that giving notice or scheduling reply time would be burdensome to it. Red Lion resisted only the Commission's direction that it make reply time available to Mr. Cook without charge if Mr. Cook was unwilling to pay for it, stating that it would have granted free time only if Mr. Cook had been willing to assert an inability to pay (see *supra*, p. 29).

No showing has been made that the personal attack policy was burdensome to licensees (or stifled broadcast debate) during the years when it was in effect prior to

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[37] Neither NBC (A., No. 717, 63a–72a) nor CBS (*id.* at 73a–81a) made any attempt at such a showing in their comments during the rule-making proceeding. *RTNDA* urged (*id.* at 92a *et seq.*) that the equal opportunities for political candidates required by Section 315(a) limited political debate (an issue not presented here), and also claimed (*id.* at 132a *et seq.*) that the Fairness Doctrine and the requirements of the rules were similarly inhibitory. It attached a supporting Appendix of anonymous comments made to the drafters of the pleading (*id.* at 157a–167a), which also was devoted in substantial part to political broadcasts, and otherwise indicated that some licensees either wished to avoid putting on views with which they or a large part of their audience disagreed, or found some difficulty in narrowing the number of points of view to be heard on an issue. No examples, actual or conjectural, were given in the area of personal attacks or political editoralizing, and such

adoption of the rule;[38] surely it can be assumed that most licensees have been conscientious enough to observe the policy even in the absence of the direct sanctions that the rule now imposes. Indeed, a survey of broadcasters' attitudes toward the rule and other aspects of the Fairness Doctrine conducted by a Senate subcommittee in 1968 showed that only a small minority thought that the rules would be burdensome or would discourage broadcasts on controversial issues.[39]

Similarly unconvincing is the Seventh Circuit's hypothesis that the alleged vagueness of the rule and the possibility of incurring monetary penalties for noncompliance will have a chilling effect on controversial programming. It may be conceded "that such terms as 'attack,' 'character,' and 'like personal qualities' are subject to diverse interpretations and appli-

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material could thus not furnish a basis for a finding of any inhibition actually caused by the rules at issue. We recognize that CBS attached to its brief in the court of appeals two "exhibits" (not presented to the Commission in the rule-making proceeding) purporting to contain possible examples of problems that might arise under the rules (A., No. 717, Vol. II). But CBS has made no specific showing of any actual inhibition; moreover, most of the examples given are simply inapposite under the rules as later amended in March 1968 (see *supra*, pp. 35–36).

[38] On the contrary, it has been the Commission's "experience over the years of operation in this area that there has been no indication of inhibition of robust debate by our fairness policies; indeed, such debate has been increasing, not declining, during the last 7 years when the personal attack principle was being developed and brought specifically to the notice of all licensees * * *." *Storer Broadcasting Co.*, 11 F.C.C. 2d 678, 680 (1968).

[39] Of 5,053 broadcasters answering the pertinent portion of the questionnaire, 2,574 (or 51 percent) approved of the personal attack rule, 2,024 (or 40 percent) disapproved, and 455.

cations" (A., No. 717, 360a). But the more relevant question, we submit, is whether the language of the rule, taken as a whole, enables a licensee to make a reasoned judgment as to whether a given statement falls within its scope. We believe that the Commission's standard—"an *attack* upon the honesty, character, integrity or like personal qualities of an identified person or group"—is capable of reasonable interpretation by licensees (emphasis added).

It is clear that an "attack" is something quite different from mere mention, comment, or even criticism. What the Commission had in mind by "attack" is perhaps best illustrated by the Reverend Hargis' purposeful assault on the honesty and integrity of Mr. Cook in the only concrete controversy before the Court. In the course of a discussion of then candidate Goldwater and the political right, Reverend Hargis had occasion to treat of a book by Cook critical of Goldwater. For the express purpose of discrediting

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(or 9 percent) had no opinion. Of the 2,024 broadcasters who disapproved, only 323 thought the rule would discourage broadcast of controversial issues. Other reasons for opposing the personal attack rules were as follows: broadcasters are responsible and will be fair—508; the rule would violate the first amendment—371; the rules lack sufficient flexibility—335; the rules are too vague—259; civil remedies for libel and slander provide sufficient protection—243; the rules may lead to government control of programming—230; it is burdensome to present transcripts and to notify persons attacked—204; and if the program on which the attack occurred was sponsored the time for reply should be purchased—42. Staff Report of Senate Subcommittee of the Committee on Commerce, 90th Cong., 2d Sess., Report on Communications (Committee Print 1968), at 81–82; see Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. Cin. L. Rev. 447, 495–498 (1968).

the book (A., No. 2, 61), Hargis challenged not the book's ideas, but its author: "Who is Cook? Cook was fired * * * after he made a false charge publicly on television * * *. Fred Cook * * * had made up the whole story and this confession was made to New York District Attorney, Frank Hogan * * *" (A. No. 2, 60). It is precisely this type of personal vilification in the context of the discussion of public issues that the rule is intended to cover. Red Lion at no time undertook to deny that this was a personal attack or that it had failed to recognize it as such. We know of no basis for believing that experienced and responsible broadcasters will have extraordinary difficulty in identifying such attacks in the future, or distinguishing them from vigorous criticism. As the D.C. Circuit concluded, "Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application" (A., No. 2, 122), citing *Connally* v. *General Construction Co.*, 269 U.S. 385, 391.

This is not to suggest that, in a given instance, reasonable men may not differ as to whether an attack covered by the rule has occurred. But the Commission has been at pains to point out that "the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle" (A., No. 717, 215a). Indeed in *L. E. White, Jr.*, 11 F.C.C. 2d 687 (1968), a case arising under the new rule, the Commission stated that there was no "question of imposing a forfeiture in the circumstances of this case where the station has made a

good faith judgment and its actions do not reflect the flagrant, clear-cut case of violation for which we stated that we would consider imposition of a forfeiture." Moreover, the forfeiture penalty of Section 503(b) of the Act by its own terms is applicable only upon the willful or repeated failure to observe a Commission rule. As has been noted, the Commission's order in *Red Lion* did not purport to carry any direct sanction.

The instant situation is thus distinguishable from *New York Times Co.* v. *Sullivan*, 376 U.S. 254, where this Court held invalid under the First and Fourteenth Amendments a rule of law exposing a newspaper to "libel judgments virtually unlimited in amount" (376 U.S. at 279) for defamatory criticism of the official conduct of a public officer, even though actual malice was not proved. The personal attack rule is not attended by any such danger. It does not impose a penalty on a licensee for any statement he may broadcast. The cost of complying with the rule in the few instances where it might apply—giving notice, providing a copy or summary, and offering reply time—does not begin to approach the burden imposed on speech in the *New York Times* situation. A willful or repeated violation of the personal attack rule may result in monetary forfeiture. But that results not from what is said by the broadcaster, but from his failure to accord the person attacked an opportunity to reply. Both the purpose of the rule and the thrust of the remedy differ radically from the circumstances involved in such cases as *New York Times*. Libel laws

provide for private redress; the personal attack rule seeks to protect the public's access to conflicting views on controversial issues, regardless of the truth or falsity thereof and the presence or absence of malice. Thus, whatever relevance *New York Times* and its progeny have supports, rather than undermines, the purpose sought to be served by the rule—the promotion of wide-open debate.[40]

The Seventh Circuit suggested that the personal attack rule—and presumably also the policy applied in *Red Lion*—is unnecessary and ill-suited to achieve the goal of fair presentation of controversial issues (A., No. 717, 369a–370a). We believe that the foregoing discussion and the Commission's opinions explaining the background and purpose of the rule amply justify the approach taken. Neither the Seventh Circuit nor any of the parties to the Commission's rule-making proceeding has shown that the Commission was wrong in its judgment that the broadcasting of personal at-

[40] Other cases of official penalty dependent upon the nature of views expressed are similarly inapposite. Compare *Smith* v. *California*, 361 U.S. 147, where a State sought to make a bookseller criminally liable for offering obscene books whether or not he knew their contents, or *Lamont* v. *Postmaster General*, 381 U.S. 301, 306, where the statute "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," in a setting of official condemnation of the mail as "communist political propaganda," or *Speiser* v. *Randall*, 357 U.S. 513, dealing with the denial of a tax exemption to one engaging in certain speech. In the instant case, there is clearly no element of censorship, which "as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 527).

tacks presents a serious problem requiring some kind of regulatory remedy. Nor have they suggested any solution to this problem that might be better than that which the Commission has set forth in the rules; indeed, the comments of broadcasters—including the respondents in No. 717—in the rule-making proceeding were limited to broadside opposition to the notion of any rules and studiously avoided offering the Commission any assistance in formulating guidelines and procedures. Moreover, we submit, it is not the function of a court of appeals to substitute its own notions of the requirements of the public interest and the best means for satisfying those requirements for the experienced and informed judgment of the responsible regulatory agency. It is not enough for the court to have said that the Commission has failed to convince it of the need for and propriety of the rule; rather, the burden is upon those who seek to set aside such a rule to show that the Commission has misapplied its statutory mandates or has infringed the First Amendment.

The opponents of the rule and the Seventh Circuit have made much of the fact that the Commission has twice modified the personal attack rule in minor respects, once at the urging of the Department of Justice (see *supra,* p. 36). The Seventh Circuit stated that this "suggests that the Commission's aims in promulgating the rules are uncertain and changing" (A., No. 717, 360a), and in some way undermines their constitutionality. In fact, a reading of the Memorandum Opinions and Orders adopting the amendments together with the original Memorandum Opinion and Order adopting the rule (A., No. 717, 209a,

223a, 333a) indicates that there has been no deviation whatever from the aim of serving the fundamental principle of the Fairness Doctrine. Instead, the amendments have been merely refinements, upon further consideration, to insure that interference with broadcasters' news functions is avoided, a concern of the Commission throughout. It is evident that the problem that gave rise to the rule is a difficult one and that drafting an appropriate rule has been a troublesome task. That task may well not yet be finished and further refinements may be necessary or appropriate with further experience. The Commission has from the beginning sought constructive suggestions from those affected by the rule, and will welcome future assistance and information as to concrete problems that may arise in its application. That kind of interplay between regulators and regulated is of the essence of the administrative process.

We submit that, considering the nature of the problems, it was improper for the Seventh Circuit to strike down the personal attack rule on its face on the basis of nothing more than speculation that the rule might be burdensome to some broadcasters. A rule of this sort should be viewed by the courts in a different constitutional light from a statute, in view of the Commission's continuing power and duty to refine and modify it in consultation with those who are governed by it, and especially in view of the restrained enforcement policy that the Commission has announced here. It is pertinent to recall that a statute would never come before the courts under the present circumstances—without the benefit of the factual rec-

ord of a particular application. The mere fact that the agency might apply a rule in an improper manner is not sufficient ground for striking it down *ab initio*. *United States* v. *Sullivan*, 332 U.S. 689, 694.

If in actual application any of the burdens and inhibitions which the Seventh Circuit foresaw eventuate, it will be time enough then for the courts to act. The sensible course, and one consistent with the First Amendment, would be to allow the rule to operate for a time to see whether the fears and concerns of the broadcasters are justified.

III

THE POLITICAL EDITORIALIZING RULE IS CONSTITUTIONAL

The political editorializing rule was codified along with the personal attack rule, and is thus involved only in the *RTNDA* case. It requires that where a station itself opposes a candidate, or supports his opponent, the candidate not favored is to be notified within 24 hours of the editorial, given a script or tape, and offered a reasonable time to reply, either himself or through a spokesman, at the station's option.[41] If the broadcast is aired within 72 hours prior to the election, the licensee must comply far enough in advance of the broadcast to enable the candidate or candidates "to have a reasonable opportunity to prepare a response and to present it in a timely fashion"

[41] The distinctions from the personal attack rule (the shorter notice period and the absolute requirement of a script or tape) reflect the fact that the station itself originates the material broadcast in advance, and thus should have no difficulty in providing a script or tape promptly.

(A., No. 717, 219a).[42] The political editorializing requirement, as is the case with the personal attack requirement, is for a "reasonable opportunity" to respond, rather than for equal time.

The rule is designed to serve the same general interest as the Fairness Doctrine and the personal attack rule—to insure that the public has access to competing views on important public questions. It is beyond dispute that a public election is an issue of vital public concern in a free society. The same considerations which support the Commission's statutory power to promulgate the Fairness Doctrine and the personal attack rule (see *supra*, p. 66) make it clear that the political editorializing rule does not exceed the Commission's authority. Nor is there any substantial basis for the Seventh Circuit's conclusion that the political editorializing rule would impair licensees' First Amendment rights. The mechanical requirements of the rule are substantially the same as those applicable to personal attacks. We have already discussed why these requirements place no unreasonable burden on licensees (*supra*, pp. 67–71). Indeed, since the licensee knows when it plans to endorse a candidate and has a script available, compliance would seem to be a relatively simple and unburdensome matter.

The two actions of the Commission in enforcing the political editorializing requirements with respect to station KING, Seattle, Oregon, an *amicus* below,

[42] The difference from the statute condemned in *Mills* v. *Alabama*, 384 U.S. 214, which flatly prevented last-minute editorials or replies, is noteworthy. This rule could permit the editorial and the reply both to be broadcast on election day without hardship to either side.

referred to by the Seventh Circuit (A., No. 717, 357a, N. 26) as "graphically" illustrating their inhibitory effect, on the contrary demonstrate clearly the need for such a standard. Complaint was made by unendorsed candidates for the Seattle City Council in the primary and general elections of 1967 that the station was treating them unfairly.[43] One complaint was by Clarence F. Massert, one of 28 candidates in the primary election, that the station had offered him two repetitions of a one-minute announcement to be delivered at unspecified times to respond to the station's 20-second editorial endorsing five other candidates which had been aired some 30 times. The Commission found this not to constitute a reasonable opportunity to respond, both because of the inadequate number of repetitions and the lack of indication that comparable time periods were being offered. Similarly, a complaint by George E. Cooley in the following general election alleged that the station offered to carry 20-second replies on behalf of four unendorsed candidates only six times, although the station's 20-second editorial endorsing four candidates was carried some 24 times. The Commission told King that no question was raised concerning its determination to allot a total of 120 seconds of response time for each candidate not supported in the editorial, but

[43] The Seventh Circuit stated that in both instances the broadcast of editorials endorsing candidates was delayed for several weeks while the Commission considered the complaints before it. However, in each case the station indicated to the Commission that it had proceeded with the editorials as scheduled, and made no claim to the contrary.

that the one-to-four ratio in number of responses was not adequate (11 Pike & Fischer R. R. 2d 628). Upon appeal to the District of Columbia Circuit in the Cooley matter (*King Broadcasting Co.* v. *United States,* No. 21397), a stay of the Commission's order was denied. King did not demand an immediate hearing on the merits although the election was imminent.

With the exception of the King Broadcasting situation, which it appeared not fully to understand, the court below struck down the editorializing rule without discussion of how it specifically infringes First Amendment rights. Rather, the court permitted its conclusions with respect to the personal attack rule to color its judgment on political editorializing without further analysis. But even assuming *arguendo* that the court below was correct in holding that vagueness or burdensomeness was fatal to the latter, the same objections are not applicable to the editorializing rule. The questions are severable, and should have been given distinct treatment by the court below.

To whatever extent the personal attack rule is subject to claims of vagueness in formulation, the political editorializing rule is triggered only by a specific and readily identifiable event—a licensee editorial endorsing or opposing one or more candidates. Moreover, any burden of compliance with the notice requirement is minimal in the editorial situation. The licensee knows in advance of his intention to state a preference, the disfavored candidates are

readily indentifiable (applying the standards established for "equal time" purposes under Section 315) and tapes or scripts to inform disfavored candidates can be prepared with the editorial to be broadcast.

Questions as to what constitutes a "reasonable opportunity" to reply may arise from time to time, especially in situations involving many candidates for a single office. But in the *King Broadcasting* matter the Commission has already established guidelines of general application on the question of frequency of repetition and times of scheduling. And the Commission stands ready to advise and interpret as special situations arise; its advice can often be obtained in advance of actual airing of station editorials so that no interruption or delay need be feared in the licensee's expression of his preference. In any event, here again the licensee need not fear imposition of forfeitures if he has endeavored in good faith to offer reasonable opportunity for response.

Nothing in the political editorializing rule is in any way inconsistent with the First Amendment. Accordingly, the court below erred in reaching the contrary conclusion by failing to give specific attention to the formulation and operation of the rule.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit in No. 2 should be affirmed and the decision of the Court of Appeals for the Seventh Circuit in No. 717 should be reversed.

Respectfully submitted.

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